A

COLLECTION

OF

CASES and RECORDS

CONCERNING

Privilege of Parliament.

[Price One Shilling and Six-pence.]

[By W. Baron Maseres, as I understand from Mr. Stowell, valuable notes in the new edit.n of State Trials now publishing under his direction. See Vol. 8. p. 200. n. H. 7 Oct. 1810.]

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With a few

OCCASIONAL REMARKS upon them.

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A COLLECTION OF CASES and RECORDS CONCERNING Privilege of Parliament; WITH A Few Occaſional REMARKS upon them.

THE privilege of members of parliament not to be arreſted by proceſs in any civil ſuit, nor, as it was generally apprehended, in any criminal proſecution for the inferior ſort of crimes, having been of late much the ſubject of converſation, it will probably be a gratification of the public curioſity to ſee a collection of the caſes and records that the law-books furniſh us with concerning it. With this view I have drawn up the following pages. How far they tend to elucidate the point of privilege in criminal caſes, which has of late

been ſo warmly agitated, I will not pretend to determine. Few perſons have a right to be poſitive concerning a queſtion in which the able and upright chief juſtice of the Common-pleas and his reverend aſſociates have been unanimouſly of one opinion, and the learned Mr. Yorke and ſome other lawyers of eminence of another. But I think it will appear at leaſt that the judgment of the Common-pleas on this occaſion has been founded on very plauſible, if not ſubſtantial, reaſons, and deſerves by no means to be cenſured as precipitate, even ſuppoſing it to have been erroneous, which, were it not for the late reſolutions of both houſes of parliament, which have determined that privilege does not lie in the ſingle caſe of a ſeditious libel, many people would ſtill beg leave to doubt of. The following caſes and records are all that I have been able to meet with in the following books; the Regiſter of Writs, the Old Book of Entries, Raſtall's Entries, Coke's Entries, Ryley's Placita Parliamentaria, Fitzherbert's Natura Brevium, the Year-books, Crompton's Juriſdiction of Courts,

Courts, Coke's Four Inſtitutes, Prynne's Animadverſions on Coke's Fourth Inſtitute, and Dyer's, Plowden's, and Coke's Reports, together with ſome more modern reports. They are placed for the moſt part in the order of time.

In the Regiſter of Writs, fol. 287, we find the following writ directed to the Juſtices of the Common-pleas.

Rex Juſticiariis ſuis de banco Salutem. Mandamus vobis quod ſi Georgius L. miles coram vobis ad ſectam alicujus per actionem perſonalem implacitatus exiſtat, talem proceſſum, et non alium, verſus ipſum in actione prædictâ fieri faciatis qualis verſus dominos, magnates, comites, ſive barones regni noſtri Angliæ, qui ad parliamenta noſtra de ſummonitione noſtra venire debent, aut eorum aliquem, ſecundum legem et conſuetudinem regni noſtri Angliæ fuerit faciendus: quia prædictum Georgium unum baronum regni noſtri prædicti ad parliamenta noſtra de ſummonitione regiâ venientium recordamur. Et hoc vobis mandamus, et aliis quorum intereſt innoteſcimus.

Teſte &c.

This is the ancient writ of privilege of a peer; by which it is evident that a lord of parliament was at all times, that is, as well out of parliament-time as within it, exempted from proceſs of Capias and Exigent in all perſonal actions, that is in effect, in all civil actions whatſoever; for in real actions the proceſs was by taking the land in queſtion into the king's hands, and not by attaching the perſon; and there was another proceſs uſed in perſonal actions againſt a peer, which was ſummons, attachment (that is, per vadium et plegios) and diſtreſs infinite, as will appear preſently from another record. The grounds of this privilege of peers are clearly acknowledged in ſome of the following caſes to be theſe two; 1ſt, a preſumption that peers have ſufficient lands whereby they may be diſtrained and brought thereby into court to anſwer to the plaintiff's demands; and 2dly, the dignity of their perſons, which the law will not permit to be degraded by ſubjecting them to common arreſts. Theſe are without diſpute the grounds of this privilege; and it extends

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to all lords of parliament, biſhops (and antiently mitred abbots, and priors) as well as temporal lords, and alſo to peereſſes in their own right, peereſſes by marriage during the coverture, and the widows of peers not having loſt their dignity by marrying again to commoners. All theſe things will be clearly made out by the following records and caſes.

The foregoing writ of privilege was to be ſued out of the chancery, as appears from Fitzherbert's comment upon it in his Natura Brevium. His Words are as follows. And if a baron, who is a peer of the realm, be ſued in the Common-pleas, and proceſs be awarded againſt him by Capias or Exigent, then he may ſue a Certiorari in the Chancery directed to the juſtices of the Common-pleas, or King's Bench, teſtifying that he is a peer of the realm, commanding them to award ſuch proceſs againſt him as they ought to do againſt a peer of the realm. And the writ is ſuch, Rex &c. as above recited.

In the Old Book of Entries I meet with nothing upon this ſubject.

In Raſtall's Entries we have the following records. Pag. 313, art. 19.

1ſt. After an action of debt had been brought againſt a baron of parliament for 10 l. in the court of Common-pleas, and a writ of Exigent had been directed to the ſheriff of London to require his appearance the proper number of times in the court of Huſtings, in order to proceed to judgment of outlawry againſt him, the following writ of Superſedeas was ſent to the ſheriff of London to order him to ſtop all further proceedings againſt him becauſe he was a baron of parliament.

Rex Vicecomitibus Londoniæ ſalutem. Cum nuper vobis præcepimus quod exigi faceretis Johannem de B. in comitatu G., militem, de huſtingo in huſtingum, quouſque ſecundum legem et conſuetudinem regni noſtri Angliæ utlagaretur ſi non comparuiſſet; et ſi comparuiſſet, tunc eum caperetis et ſalvo cuſtodiri faceretis, ita quod haberetis corpus ejus coram juſticiariis noſtris apud Weſtmonaſterium ad talem diem, ad reſpondendum Johanni R. de placito quod reddat ei decem libras quas

ei

ei debet et injuſtè detinet, ut dicit: Quia tamen prædictus Johannes eſt unus baronum regni noſtri Angliæ, qui ad parliamentum noſtrum et progenitorum noſtrorum quondam regum Angliæ de ſummonitione noſtrâ regiâ venerunt, prout nos per breve noſtrum, Juſticiariis noſtris de banco miſſum et coram eis jam reſidens, recordabamur; *quâ de cauſâ utlagatio in perſonam ipſius Johannis, ratione dignitatis ſuæ, non poteſt in actionibus perſonalibus promulgari*, ſicque breve noſtrum vobis directum de exigi faciendo prædictum Johannem contra mandatum noſtrum improvide emanavit, Vobis præcipimus quod de eodem Johanne ulterius exigendo, ſeu utlagando, occaſione præmiſſorum omnino ſuperſedeatis; et qualiter hoc præceptum noſtrum fueritis executi ſcire faciatis Juſticiariis noſtris apud Weſtmonaſterium ad præfatum terminum; et habeatis ibi hoc breve. Teſte &c.

Note. The writ referred to in this writ by the words *proüt nos per breve noſtrum &c.* is evidently the writ of privilege which has been above recited from the regiſter.

The next record in Raſtall is as follows:

Rex vicecomitibus civitatis E. ſalutem. Sciatis quod nos per breve noſtrum juſticiariis noſtris de banco directum recordati ſumus quod E. N. nuper de L., miles, alias dictus E. N. nuper de B. in comitatu K. miles, eſt unus baronum regni noſtri Angliæ ad parliamenta noſtra de ſummonitione noſtrâ venientium, propter quod volumus quod ſi ipſe coram eis ad ſectam alicujus per actionem perſonalem implacitatus exiſtit, talem proceſſum, et non alium, verſus ipſum in actione hujuſmodi fieri faceretis qualis verſus dominos, magnates, comites, ſive barones regni noſtri Angliæ, qui ad parliamenta noſtra de ſummonitione noſtrâ venire debent, aut eorum aliquem, ſecundum legem et conſuetudinem regni noſtri Angliæ fuerit faciendus: Et, *quia nullus proceſſus verſus aliquem eorum per attachiamentum corporum ſuorum, nec per brevia de exigendo fieri debet, ſed per ſummonitionem, attachiamentum, et diſtrictionem per terras et catalla ſua, in curiam noſtram debent induci in hujuſmodi placitis reſponſuri*; Vobis præ-

præcipimus quod de ipſo E. exigendo, capiendo, ſive in aliquo moleſtando, ratione aliquorum brevium, vel alicujus brevis noſtri de judicio, quæ de dictâ curiâ de banco emanarunt, penès vos remanentium, ſuperſedeatis omninò; et qualiter hoc præceptum noſtrum fueritis executi ſcire faciatis juſticiariis noſtris apud Weſtmonaſterium, et habeatis ibi hoc breve.

Teſte &c.

Ad quem diem hic venit prædictus E. per J. B. attornatum ſuum, et nunc vicecomites civitatis prædictæ, videlicet, J. G. et W. W., mandant quod ad comitatum civitatis E. tentum ibidem die lunæ, ſcilicet, 17 die Septembris anno regni domini regis nunc triceſimo ſecundo, et ſic ad quatuor comitatus proxime præcedentes, prædictus E. exactus fuit, et non comparuit; et, quia ad nullum corundem comitatuum comparuit, utlagatus fuit; proüt J. J. et J. W. nuper vicecomites civitatis prædictæ, ultimi prædeceſſores ipſorum nunc vicecomitum, breve de exigendo prædictum eiſdem nunc vicecomitibus, in feſto Sancti Michaelis anno 32 prædicto,

arraiatum

arraiatum et executum in dorſo ejuſdem brevis liberarunt, et quod poſteà breve de ſuperſedendo executioni prædicti brevis de exigendo eiſdem nunc vicecomitibus per dictos predeceſſores eorum ſibi liberatum fuit, continens quod per aliud breve ſuum Juſticiariis ſuis de banco directum recordatus fuit quod prædictus E. eſt unus baronum regni ſui ad parliamenta ſua venientium; propter quod voluit quod, ſi ipſe coram eis ad ſectam alicujus per actionem perſonalem implacitatus exiſterit, talem proceſſum, et non alium, verſùs ipſum, in actione hujuſmodi fieri facerent qualis verſùs dominos, magnates, comites, ſive barones regni ſui Angliæ, qui ad parliamenta ſua venire debent, aut eorum aliquem, ſecundum legem et conſuetudinem regni ſui Angliæ fuerit faciendus. Et quia hoc coram Juſticiariis domini regis hic recordatum fuit diu ante utlagariæ prædictæ promulgationem, prout per idem breve inde inter recorda ſine die affilatum ſatis conſtat, *et nullus proceſſus verſùs aliquem eorum per attachiamentum corporum ſuorum, nec per brevia de exigendo, fieri debet*; *Immò ipſi per ſum-*

ſummonitionem, attachiamentum, et diſtrictionem per terras et catalla ſua in curiam domini regis debent induci in hujuſmodi placitis reſponſuri : Ideò utlagaria prædicta adnulletur et pro nullo penius teneatur, et prædictus E. eâ occaſione non moleſtetur in aliquo, nec gravetur, ſed eat inde quietus.

Theſe two records not only prove the privilege of lords of parliament in perſonal actions, to wit, that they ſhall not be attached by their bodies, nor be liable to proceſs of outlawry, but inform us what proceſs ſhall be uſed againſt them in the ſtead thereof, to wit, ſummons, attachment (that is, per vadium et plegios) and diſtreſs infinite by their lands and chattels; and they likewiſe declare the reaſon of this privilege, that it is *ratione dignitatis ſuæ*, on account of their high dignity.

The caſes in the year books relative to this ſubject are as follows.

Mich. 21 Edw. 3. page 59, plac. 1.

A writ of treſpaſs was brought againſt a Prior; on which he was attainted of a treſpaſs. The plaintiff prayed a Capias againſt him to take his body, but he could not obtain

tain it becauſe the defendant was a prior. And it was ſaid that he could not have a Capias againſt a prior, unleſs he were indicted of felony, or were attainted of felony, &c.

Note. The &c. at the end of this caſe ſeems to mean treaſon, or ſuch crimes as are either felony or greater than felony; for all crimes of a lower degree than felony come under the general denomination of treſpaſſes, for which it is declared in this caſe a capias does not lie againſt a prior. Sed quære.

Fitzherbert in his Grand Abridgment mentions a caſe of an action of debt brought againſt the biſhop of S. in 31 Edw. 3. Where Fitzherbert found it I do not know; for there are no reports of that year of Edw. 3. in the printed collection of the Year-books. However the caſe, as reported by Fitzherbert, Title Proceſs, art. 54. is as follows.

Debt againſt the biſhop of S. The ſheriff returns that he has nothing: upon which a teſtatum iſſues to another ſheriff, who makes the ſame return: and then to a third

third ſheriff, who alſo makes the ſame return: upon which account he prayed a Capias, but could not obtain it. He then prayed a writ to the Metropolitan to cauſe his clerk to come; but it was not allowed. And afterwards proof was given that he had reſerved a rent of an hundred pounds upon a manor that had been leaſed by him; upon which, by the conſent of the whole court, a writ was awarded to diſtrain him *per omnes redditus, terras, et catalla*, &c. Hil. 31 Edw. 3.

Fitzherbert mentions two other caſes which I cannot find in the Year-books; the one in 8 Ric. 2, the other in 10 Hen. 4. Theſe caſes, as reported in Fitzherbert, are as follows.

Title, Proceſs, art. 224. Debt upon bond by one R. againſt the counteſs of Urmond; the ſheriff returns that ſhe has nothing. Wade prayed a Capias againſt her; for you have here before you the records of two Capiaſes that have been awarded againſt the ſaid counteſs at the ſuit of divers perſons in the like caſes; and therefore we pray to have one now.

Belknap. We will inſpect the roll.

Which

Which he accordingly did, and then a Capias was awarded. Hil. 8. Ric. .

Title, Proceſs, art. 198. A man ſhall have a Capias againſt a lord, or an abbot, where-ever he ſhall have committed a contempt, &c. in replevin. Hil. 10. Hen. 4. We now return to the Year-books.

In 43 Edw. 3, pag. 33. Debt againſt the biſhop of London in the county of Middleſex. The ſheriff returns that he has nothing; upon which the party prayed a Capias. The court refuſed to grant it.

11 Hen. 4, pag. 15, plac. 34. In a writ de Homine replegiando brought againſt the Lady de Spenſer and others, upon the return of the Pluries the ſheriff returns that that lady and others had eloined the man that was in cuſtody, ſo that he could in no manner make replevin of him.

Tyrwhit. It ſeemeth that the ſheriff ſhould be amerced, becauſe he has not ſaid that the man is eloined out of his bailiwick; for if the man is within the county, it ſhall be intended that the ſheriff can make replevin of him.

Gaſcoyne. He may be kept ſo privately

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in the county, firſt in one place and then in another, that the ſheriff cannot know where he is: And he has returned that he was in no wiſe able to make replevin of him, which is therefore a good return.

Hulſe was of the ſame opinion.

Then a Capias was prayed to take the bodies of the lady and the other perſons in Withernam.

Gaſcoyne. It muſt be granted, albeit that the lady is a peereſs of the realm, ſo that a Capias does not lie againſt her.

Hulſe. In a writ of debt or treſpaſs a Capias does not lie againſt an earl or baron, or the like perſon, becauſe, by reaſon of their high rank, the law preſumes that they have ſufficient ſubſtance to be brought into court by proceſs of Diſtringas. But in the preſent caſe the miſdemeanour that ſhe has been guilty of in not ſuffering the replevin to be made is the ground upon which her body ought to be taken into cuſtody, whatever her rank might happen to be. And this was done in the time of king Richard againſt Matthew Redman and others; and afterwards thoſe who were taken were

brought

brought to the bar, and delivered to the cuſtody of the Marſhal &c; and the perſon who had been eloined declared againſt the lady and againſt another perſon, who appeared: the lady alledged villenage in his perſon as regardant to the manor of B; the plaintiff replies that he is free and of free condition; and they find ſurety under a certain penalty to proſecute their action with effect according to the courſe of the law, and were then adjourned. And againſt thoſe who did not come in the plaintiff prayed a Capias.

Tyrwhit. This you ought not to have: for the reaſon why a Capias was granted to you before was becauſe the plaintiffs were eloined; but now they are ſet at liberty; therefore ſue a pone per vadios &c, which was accordingly done. Vide Hil. 8 Ric. 2.

Note. The caſe here referred to in 8 Ric. 2. ſeems to be that which has been cited from Fitzherbert's Abridgment; at leaſt it is of the ſame year of Ric. 2. But in the printed collection of the Year-books there are no reports of any part of the reign of Ric. 2.

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The next caſe in the Year-books is as as follows.

1 Hen. 5, p. 14, plac. 29. Note, If any miniſterial officer of the king arreſts any man by the king's command, and the perſon ſo arreſted is reſcued from him by any baron, earl, duke, or abbot; if the ſheriff or other officer returns that the man has been reſcued out of his hands by any one of thoſe perſons, the juſtices ſhall award a Capias againſt him who made the reſcue, notwithſtanding the ſtatute which enacts that no Capias ſhall be awarded againſt them. The reaſon is becauſe of the diſobedience of the law and the hindrance of juſtice.

N. B. The ſtatute here referred to ſeems to be 38 Edw. 3, Stat. 2, cap. 1. which enacts that thoſe who ſhall ſue out citations from the court of Rome, or ſhall obtain from the Pope grants of deaneries, archdeaconries, or other eccleſiaſtical dignities or benefices belonging to the patronage of the king or any of his ſubjects, ſhall be liable, when duly convicted thereof, to the penalties of the ſtatute of Proviſors in 25

Edw. 3; and that in order to their trial and conviction all ſuch offenders ſhall, as well at the ſuit of the king as of the party injured, or any other perſon of the kingdom that will find ſufficient pledges and ſureties that he will purſue againſt them, if they be defamed and violently ſuſpected of theſe offences, be arreſted and taken by the ſheriffs of the counties, the Juſtices in their ſeſſions, deputies, bailiffs and other the king's miniſters, and be forced to give good bail that they will appear before the king or his council to abide the judgment of the law; with a ſalvo to the prelates and lords of the kingdom contained in theſe words, "Saving the eſtate of the prelates and "other lords of the kingdom touching "the liberty of their bodies, ſo that by "force of this ſtatute their bodies ſhall "not be taken."

This ſaving clauſe ſeems to be intended only to preſerve to the prelates and lords of the realm a privilege they were already in poſſeſſion of, and not to confer a new immunity upon them. And in this caſe it ſhould ſeem that thoſe great perſons were

privi-

privileged from arreſts not only in civil ſuits, but likewiſe in criminal proſecutions for offences of an inferior nature; this ſtatute being a penal ſtatute for the puniſhing thoſe perſons who applied illegally to the court of Rome, and who were conſidered as guilty in ſo doing of an offence againſt the king's prerogatives and the conſtitution of the kingdom, as well as againſt the particular rights of patronage of the king or other private patrons. If this inference be juſt, it may ſerve to explain and confirm the general aſſertion in the caſe abovecited in Mich. 21 Edw. 3, that a Capias does not lie againſt a prior unleſs he be indicted or attainted of felony.

The next caſe in the Year-books is as follows.

14 Hen. 6. pag. 2. plac. 9. A writ of debt was brought againſt a man and his wife counteſs of D; who made default at the Pluries Capias returned; upon which an Exigent was demanded againſt them.

Newton ſaid that a man could not have an Exigent againſt an earl nor againſt a counteſs.

Chanter. The reaſon why an Exigent may not be awarded againſt an earl is becauſe the law ſuppoſes that no man can be an earl without having lands; but a woman may be a counteſs and have no lands.

Fulthorp. The preſumption that an earl muſt have lands is not the only reaſon why an Exigent is not permitted to go againſt him: but another reaſon is the dignity of his name; for an Exigent is not awardable againſt a duke, an earl, or a baron.

Martin ſaid, In the preſent caſe ſhe has loſt the name of counteſs by taking a huſband; for by taking a huſband all the names ſhe had before are loſt; which Paſton confirmed; for which reaſon it ſeemeth that the writ muſt abate, becaule in the writ ſhe is called counteſs.

34 Hen. 6, pag. 26. plac. 3. Laken, arguendo, ſays, If my ſervant is arreſted with me as we are coming to this court, or to parliament, in this caſe I may have a writ of privilege as well for my ſervant who is attendant upon me as for myſelf: and

and this is allowed for my advantage and eaſe.

Note. By this caſe it appears that a writ of privilege was allowed for a member of the houſe of commons coming to parliament as well as for a peer.

Fitzherbert in his grand abridgement, title Exigent, art. 2, mentions a caſe in 36 Hen. 6, which I do not find in the Year-books. It is as follows.

Obſerve, per Danby, that it is clearly in the election and diſcretion of the juſtices to award an Exigent againſt a baron or lord of parliament, or a diſtreſs infinite, as alſo againſt an abbot, when they knew he was a lord of parliament. But if a judgment is given againſt a lord of parliament in debt or account, it is in that caſe proper to award a Capias or an Exigent, and they may not award a diſtreſs. And if he could only have a Capias Infinitè, there would then follow a miſchief to the plaintiff; for if he had aliened land after the judgment, the plaintiff could have no remedy unleſs an Exigent be awarded: To which Newton aſſented; but Moile was

of a contrary opinion. Note, that the court declared that they were not obliged to take cognizance, and that they could not take cognizance, of his being a lord of parliament, unleſs it was certified to them out of the court of Chancery, &c. Mich. 36 Hen. 6.

The next caſe in the Year-books is as follows.

5 Edw. 4. p. 108. In the Exchequer-chamber at the ſame time one of the Juſtices demanded of his companions whether, if a biſhop of Wales, or Ireland, is ſued here at the common law in the King's Bench, having nothing within the juriſdiction of the king where the king's writ runneth, and the ſheriff returns a nihil upon him, becauſe in truth he has nothing within his county, nor in any other county in England where the king's writ runneth, though perhaps he may have ſome lands in Lancaſhire, or Cheſhire, or ſome other ſuch exempt diſtrict, or in Wales or Ireland, &c. a Capias or Exigent ſhall iſſue againſt him in order to his being outlawed, like a common perſon, becauſe he hath

hath nothing. And ſome of the juſtices ſaid that if a peer of the realm hath lands in Lancaſhire or Cheſhire, or any other ſuch county where the king's writ doth not run, although he be ſued in another county at the common law, and nihil is returned upon him, yet it ſeemeth that proceſs of outlawry ſhall not iſſue againſt him, becauſe he is a peer of the realm, and therefore ſhall not be put in exigent. But if he is a biſhop of Wales or Ireland, perhaps it may be otherwiſe; for in that caſe perhaps he is not a peer of the land any more than a biſhop of France or any other country, who ſhould come and live here in England by licence of the king.

Markham. It is proper to conſider further of this matter.

11 Hen. 7, pag. 6. plac. 23. Frowike, arguendo, ſays that it has been adjudged that in an action of treſpaſs brought againſt two perſons, a Superſedeas of Parliament caſt for one of them ſhall not avail the other. And yet it appeared the other was a treſpaſſour.

N. B. This paſſage is brought to ſhow that a Superſedeas was at this time allowed to ſtop proceſſes iſſued againſt a member of parliament, which ſeems here to be meant of a member of the houſe of commons, as in the caſe above-cited, 34 Hen. 6, in actions of treſpaſs.

15 Hen. 7, pag. 9. plac. 12. Nota. In a Præmunire againſt the abbot of St. Alban's, the defendant prayed that he might make his attorney becauſe he was a lord of parliament.

Buttiler ſaid that in Paſch. 9 Edw. 4, in a like caſe againſt an abbot that was a lord of parliament, he made an attorney.

But the court ſaid that the ſtatute was general that no one ſhould make an attorney in this writ; and therefore it ſeemeth that he ſhall not make an attorney. And they ordered the defendant to produce that precedent of making an attorney the next day.

And the court determined that he may appear by attorney by a writ in the Chancery delivered to them, (as one may pray to be received by attorney by writ in Chancery)

cery) otherwiſe not, notwithſtanding he was a lord of parliament. And ſo in a Ceſſavit againſt a lord of parliament, if he will tender the arrearages before judgment, he muſt come in his own proper perſon, and not by attorney. And alſo a lord of parliament may come in by Cepi Corpus, and ſhall be committed to ward, and ſhall not make an attorney.

26 Hen. 8, pag. 7, plac. 32. Brown came to the bar, and prayed a Capias againſt an abbot upon a recovery in an action of debt.

Fitzherbert. This you cannot have: for every abbot is ſufficient; for which reaſon no Capias lies againſt him any more than againſt an earl or lord.

Deinſhill. I may have a Capias againſt a knight.

Mervin. A man may be a knight and have no freehold: but ſo cannot he be an abbot by common intendment.

Brown. Then I ſhall be without remedy for want of execution.

Fitzherbert. Not ſo: for you may have

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an Elegit upon a Teſtatum of another county in which the abbot is ſufficient.

Quod Nota.

27 Hen. 8, pag. 22, plac. 18. A prior was attainted in treſpaſs, and the plaintiff prayed a Capias againſt him, and could not obtain it becauſe he was a prior.

In debt againſt a biſhop, the ſheriff returned *nihil habet*; upon which *teſtatum fuit* that he had ſomething in another county; whereupon proceſs was awarded to the ſheriff of the other county, who made anſwer that he had nothing; upon which a Capias was prayed, but could not be obtained. Hil. 31 Edw. 3.

Upon a Reſcous returned by the ſheriff to have been made by a duke, or earl, or baron, a Capias ſhall be awarded, notwithſtanding that the ſtatute directs that a Capias ſhall not iſſue againſt them: and the cauſe is for the diſturbance of the law and the offence done to the king. Mich. 1 Hen. 5.

In debt againſt the biſhop of London the Sheriff returned *nihil habet*; upon which the plaintiff prayed a Capias, but could

could not obtain it. Paſch. 43 Edw. 3, which caſes are in Fitzherbert's Abridgment, title Proceſs.

A man recovers in treſpaſs againſt a biſhop, he ſhall have an Elegit and not a Capias. Quod vide. Tales executiones Trin. 29 Edw. 3, fol. 54. An Exigent ſhall be awarded againſt a lord of parliament.

Mich. 27 Edw. 3, and Trin. 22 Edw. 3. A lord of parliament ſhall not be ſworn on an inqueſt.

Mich. 48 Edw. 3, and Ann. 3 Hen. 7. If a baron or lord of parliament is impleaded in an action, upon iſſue joined it is neceſſary to have one or more knights returned upon the inqueſt, or otherwiſe he may quaſh the pannel. Quod vide Trin. 13 Edw. 2.

In Brooke's Abridgment, title Exigent, after a ſhort account of ſeveral of the caſes that have been here cited from the Yearbooks, we find the following obſervation. "See in the Old Natura Brevium in the "writ of debt that proceſs of outlawry "does not lie againſt archbiſhops, biſhops, "earls,

" earls, barons, nor knights: for it is un-
" derſtood that they are ſufficient. Yet
" this does not hold of knights at this
" day: for knights are oftentimes out-
" lawed; but if a lord of parliament is
" outlawed, it is error as it is held: Yet
" I have heard this denied by antient Cur-
" ſitors."

We find alſo in Brook, title Privilege, vol. 2, fol. 159, b, this note. Obſerve that the parliament gives no privilege *tempore vacationis, ſed ſedente curiâ.*

Theſe are all the caſes relative to the ſubject that I can meet with in the Year-books, or in Fitzherbert's or Brooke's Abridgment. And though moſt of them are very perplexed and obſcure, and particularly thoſe cited from Fitzherbert's Abridgment, and which are not to be found in the Year-books, yet from the general tenor of the reaſoning uſed in them and the determinations of thoſe which are moſt clear and intelligible, we may draw theſe two concluſions; 1ſt, that a lord of parliament ſhall never in a civil action be liable to proceſs of Capias and Exigent, but

but to proceſs againſt his lands and goods; and that this privilege holds out of parliament-time as well as in it, and is grounded partly upon a preſumption in law that a lord of parliament hath ſufficient lands and goods whereby he may be diſtrained, and partly upon the reſpect due to the dignity of their perſons, upon which latter ground it is extended to the widows of peers not degraded by a ſecond marriage with a commoner, as appears by the caſe in 14 Hen. 6. And 2dly, that for any contempt ſhewn to the king's courts, as by reſcuing a perſon that has been arreſted by due courſe of law, as in the caſe in 1 Hen. 5, or by eloining or ſecreting a perſon whom the ſheriff is ordered to replevy, ſo that the ſheriff cannot replevy him, as in the caſe in 11 Hen. 4, or (we may by parity of reaſon preſume) by any other ſuch hindrance of the adminiſtration of juſtice by the king's judges, their bodies may be taken, notwithſtanding their privilege in all common caſes.

Two other concluſions ſeem likewiſe to follow from the foregoing caſes, though not

not ſo clearly as the two foregoing ones. The firſt is that the perſons of lords of parliament were not liable to be arreſted for the inferior ſort of crimes. This ſeems to follow from the ſtat. 38 Edw. 3. above-cited, which relates to criminal proſecutions, and from the caſe of the writ of treſpaſs brought againſt a prior in 21 Edw. 3, and the dictum at the end of it. And it muſt be obſerved that an action of treſpaſs partakes in ſome degree of the nature of a criminal proſecution at the ſuit of the king; for there is both in the writ and declaration an allegation on the behalf of the king, that his peace has been broke and his dignity treated with contempt, as well as an allegation concerning the particular injury and damage the plaintiff has received; on which account there is a proceſs, originally, or by the common law, peculiar to this action, grounded on the former allegation, namely the Capias pro fine, the fine to the king being as it were his ſatisfaction for the breach of his peace, juſt as the other damages are the ſatisfaction to the plaintiff for his injury; and this fine

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to the king, though now it is become a matter of form, was antiently a very ſerious matter, and very nearly as heavy in the caſe of an action as in that of an indictment or proſecution merely at the ſuit of the king, which latter kind of proſecution I take to have been much leſs frequent formerly than of late years.

Thus in an action of treſpaſs brought in parliament in 18 Edw. 1 (as was then the practice) by the king, the king's ſteward (of his houſhold) Peter de Chanet, the king's marſhal (of his houſhold) Walter de Fanecourt, the earl of Cornwal and the abbot of Weſtminſter againſt the prior of the Holy Trinity in London and Bogo de Clare, (or, as the record expreſſes it, in which the two latter perſons were attached to anſwer the five former) for that the ſaid prior ſerved an eccleſiaſtical citation upon the earl of Cornwall as he was going through Weſtminſter-hall to attend the parliament according to the writ of ſummons he had received, by which citation the earl was commanded to appear on ſuch a day

a day at ſuch a place before the archbiſhop of Canterbury, and the ſaid Bogo de Clare procured the ſaid prior to ſerve the ſaid citation, which ſerving the ſaid citation is laid to have been in contempt of the lord the king, and to his diſgrace of ten thouſand pounds; alſo to have been to the prejudice of the eccleſiaſtical franchiſe of the abbot of Weſtminſter granted him by the court of Rome, by which Weſtminſter-hall, as being within the juriſdiction of the abbot of Weſtminſter, is exempted from all juriſdiction epiſcopal or archiepiſcopal, and to the abbot's damage thereby of one thouſand pounds; alſo to have been to the prejudice of the office of the ſteward and marſhal (of the king's houſhold), to whoſe office alone it appertaineth, and to no other, to ſerve all ſummonſes and attachments within the king's palace; and alſo to have been to the damage of the earl of Cornwall of five thouſand pounds. The prior and Bogo de Clare confeſs the fact, and put themſelves upon the king's mercy. And judgment is given againſt them that they be committed to the Tower

Tower during the king's pleaſure. Afterwards Bogo de Clare is fined to the king in two thouſand marks, (a great ſum now, in thoſe days an immenſe one) and agrees to pay a thouſand pounds damages to the earl of Cornwall for the treſpaſs committed againſt him, which the earl of Cornwall at the inſtance of the biſhops of Ely and Durham, and other great men, afterwards remitted excepting one hundred pounds. See the record itſelf cited here below from Ryley's Placita Parliamentaria, p. 6 and 7.

The other concluſion that ſeems to follow from the foregoing caſes is that in parliament-time members of the houſe of commons and alſo their menial ſervants attendant upon their perſons, were privileged from being arreſted in actions of debt, as well as members of the houſe of lords: and that they were intitled to a writ of privilege for that purpoſe. Alſo that this privilege holds while they are coming up to parliament, and going home again from parliament, as well as during the time that the parliament is actually ſitting; or, as it is often expreſſed, eundo, morando,

et redeundo. This concluſion ſeems to follow from the caſes in 34 Hen. 6. and 11 Hen. 7.

In the Counteſs of Rutland's caſe in Lord Coke's 6th Report fol. 52. it is laid down for clear law that a Capias ad Satisfaciendum does not lie againſt a lord of parliament, or a peereſs by birth or by marriage, (unleſs ſhe has ſince degraded herſelf by mariytng a commoner) in action of debt or treſpaſs. Many of the foregoing caſes in the Year-books are collected in this report.

There is nothing in Lord Coke's 1ſt, 2d, and 3d Inſtitute relating to this ſubject. In his 4th Inſtitute, pag. 24 and 25. he has quoted a few records relating to it, but is far from explaining it in a full and ſatisfactory manner.

The firſt is a petition of the maſter of the Temple to the king made during the ſitting of parliament, praying that he may diſtrain upon one of the members of his council, which in this place ſeems to mean the parliament, with the king's anſwer to it in the negative. It is an obſcure uninforming

forming record; and my lord Coke has cited only part of it. Mr. Prynne in his animadverſions on the 4th Inſtitute, p. 18, has given us the whole of it, which is as follows.

Magiſter militiæ templi petit quod dare poſſit epiſcopo Menevenſi triginta ſolidos redditûs annui et arreragia decem annorum pro quâdem domo in Londoniâ pro quâ non poteſt diſtringere niſi tempore parliamenti. Petit quod habeat licentiam diſtringendi tempore parliamenti. Reſp. Non videtur honeſtum quod rex concedat quod illi de concilio ſuo diſtringantur tempore parliamenti: Sed alio tempore diſtringat per oſtia et feneſtras, prout moris eſt.

N. B. To make ſenſe of this record, I ſhould imagine we ought to read *quod diſtringere poſſit ſuper epiſcopo Menevenſi pro triginta ſolidis* inſtead of *quod dare poſſit epiſcopo Menevenſi triginta ſolidos*, and that the word *niſi* ſhould be left out. Sed quære.

This record, ſays Mr. Prynne, proves only this; that the king would not grant a ſpecial licence to this maſter to diſtrain any of the lords of his council during their at-

tendance on him in parliament, but left him to his liberty and the law, with this advice, rather to diſtrain at ſome other time, and that by the doors and windows as the cuſtom then was: which proves not that a lord or member of parliament is not diſtrainable by law by his chattels in the country or city, (if not neceſſary for him during his attendance in parliament) for the rent due to his landlord; for then they ſhould not be diſtrainable for rents or taxes due to the king, church, or poor, which would ſeem unjuſt, and prove very miſchievous, eſpecially when parliaments ſit and continue ſo long as they now uſe, and are adjourned for many months together, claiming their privilege though they ſit not, which was antiently confined only to eundo, morando, et redeundo, even when parliaments ſeldom ſat above two or three weeks or one month, and then diſſolved; during which ſhort ſpace diſtreſſes for members rents might well be forborn without any, or with little, prejudice to their landlords.

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The next record cited by lord Coke is that which has been already mentioned concerning tbe prior of the holy Trinity and Bogo de Clare. It is cited but imperfectly by my lord Coke, and is adduced by him to prove that a member of parliament ought to be free from arreſts. But this it does not prove with any certainty; for the earl of Cornwall's being a member of parliament, and being then going to parliament, though it is mentioned in the declaration, yet is not laid to be the ground of the complaint againſt the defendants; but the offence to the king ſeems to have conſiſted in ſerving an eccleſiaſtical proceſs within his palace by others than the officers of his houſhold, his ſteward and marſhal; which was alſo an injury to the ſaid ſteward and marſhal, as the ſerving it within the exempt juriſdiction of the abbot of Weſtminſter made it be an injury to the ſaid abbot. However for the reader's more perfect ſatisfaction I ſhall inſert the whole record itſelf from Ryley's Placita Parliamentaria, pag. 6 and 7. It is as follows.

Querela Edmundi, comitis Cornubiæ, verſus Bogonem de Clare et priorem ſanctæ Trinitatis, London.

Prior ſanctæ Trinitatis London et Bogo de Clare attachiati fuerunt ad reſpondendum domino regi, Petro de Chanet Seneſchallo domini regis, Waltero de Fanecurt Mareſcallo domini regis, Edmundo comiti Cornubiæ, et abbati Weſtmonaſterii, de hoc quod, cum idem comes ad mandatum domini regis ad iſtud parliamentum ſuum London veniſſet, et per medium majoris aulæ Weſtmonaſterii verſùs conſilium domini regis tranſiſſet, ubi quilibet de regno et pace domini regis licitè et pacificè venire et negotia ſua proſequi debet, abſque hoc quod aliquas citationes vel ſummonitiones ibidem admittat, prædictus prior, ad procurationem ipſius Bogonis, die Veneris primâ ante feſtum purificationis beatæ Mariæ hoc anno, prædictum comitem in prædictâ aulâ citavit quod compareret ad certos diem et locum coram archiepiſcopo Cantuarienſi ſuper ſibi objiciendis reſponſurus; in contemptum domini regis manifeſtum, et dedecus ſuum decem mille librarum;

brarum; et in læſionem libertatis eccleſiæ prædicti abbatis conceſſæ per curiam Romanam, cum prædictus locus omninò ſit exemptus a juriſdictione archiepiſcoporum ſeu epiſcoporum quorumcunque per libertates ſibi et eccleſiæ ſuæ Weſtmonaſterii conceſſas, et ad damnum ipſius abbatis mille librarum; et in prejudicium officii prædicti Seneſchalli et Mareſchalli manifeſtum, et damnum non modicum, cum ad ipſorum officium, et non ad alium, ſummonitiones et attachiamenta infrà palatium domini regis pertinent facienda; et etiam ad damnum prædicti comitis quinque mille librarum; Et inde producunt ſectam, &c.

Et prior et Bogo veniunt, et prior benè cognoſcit quod ipſe citavit prædicto die et loco prædictum comitem, ut prædictum eſt. Et ſimiliter prædictus Bogo bene cognoſcit quod ipſe omninò ignoravit quod prædictus locus fuit exemptus,et quod non intellexit aliquem contemptum domini regis, ſeu aliquod præjudicium ejus miniſtris per citationem illam feciſſe; et omninò ponit ſe in gratiam, miſericordiam, et voluntatem domini regis de alto et baſſo. Et

quia prædictus prior et Bogo cognoſcunt prædictam citationem prædicto die et loco per ipſos fuiſſe factam, et quæ manifeſtè facta fuit in contemptum domini regis, Conſideratum eſt quod prædicti prior et Bogo mandentur turri Londoniæ, et ibidem cuſtodiantur ad voluntatem domini regis, &c. Et quoad prædictos Comitem et Abbatem, datus eſt dies eis die Veneris in craſtino Purificationis beatæ Mariæ &c. Poſteà prædictus Bogo invenit plegios ſubſcriptos ad ſatisfaciendum domino regi de prædictâ tranſgreſſione ante receſſum ſuum de Weſtmonaſterio de inſtanti parliamento, alioquin quod ipſi reſtituent corpus ejus turri Londoniæ in receſſu domini regis; ſcilicet, Johannem de Eyville, Henricum Hoſe, Robertum le Vele, Radmundum Blut, Roulandum de Erlei, Robertum de Radyngton, Willielmum de Rie, Willielmum de Nerford, et Willielmum Evereys, qui ipſum plegiaverunt in formâ prædictâ. Et prædictus prior invenit plegios ſubſcriptos, ſcilicet, Robertum de Melkele, Robertum de Gravel, Willielmum de Melkeſh, et Willielmum de Sutton, qui ipſum priorem

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plegiaverunt ſub eadem formâ quâ prædicti Johannes de Eyville et alii ſuperiùs prædictum Bogonem plegiaverunt. Poſteà venit prædictus Bogo, et finem fecit domino regi pro prædictâ tranſgreſſione per duas mille marcas; Et recipitur per plegios, &c.

Et quoad prædictum Comitem, poſteà venit prædictus Bogo et vadiat eidem Comiti mille libras pro tranſgreſſione ſibi factâ. Et idem Comes, ad inſtantiam Epiſcopi Dunelmenſis, Epiſcopi Elienſis, et aliorum de conſilio ipſius domini regis, remiſit eidem Bogoni prædictas mille libras uſque ad centum libras, &c. Et ſciendum quod plegii de prædicto fine admittuntur coram Theſaurario ad ſcaccarium per præceptum domini regis. Et prædictus prior mittitur ibidem ad faciendum ſecundùm quod Theſaurarius ei dicet ex parte domini regis.

Lord Coke afterwards quotes another record of the 10th of Ed. 3, which is not at all appoſite to the ſubject of privilege of parliament. It is a charter, or letter patent, of the king under the great ſeal, declaring that he has pardoned maſter Henry de Hareweden, clerk, Edmund de Lewknor, and

and John de Wedlingburgh, ſo far as reſpects the impriſonment of their perſons, for the crime of having ſerved a citation and other eccleſiaſtical proceſſes againſt John de Thoreſby, his clerk, in the court of chancery in the preſence of the chancellor, which is ſaid to have been a great contempt of the king, becauſe all his courts ought to be and have of old time been, ſo free and exempt that no eccleſiaſtical juriſdiction ſhould interfere with them, and no one ought to enter them to ſerve or execute any eccleſiaſtical proceſs. This is the whole purport of this record, and ſeems to have nothing to do with privilege of parliament. Lord Coke indeed ſays that John de Thoreſby was at this time clerk of the parliament; but this Mr. Prynne, who was a very accurate antiquarian, denies. And if he had been ſo, it is certain the record ſays not a word of it, and therefore it could not be concluded that that was the circumſtance that made the ſerving this eccleſiaſtical proceſs criminal.

Lord

Lord Coke cites a few words of two other records, which have a material relation to the preſent purpoſe. They are writs to the juſtices of aſſize during the ſitting of parliament, commanding them not to try any aſſizes or other cauſes, wherein any perſons that are ſummoned to parliament, or bound to attend it, are parties, becauſe of the inability they thereby lie under of attending their cauſes in perſon. The firſt writ ſeems to relate to the lords of parliament, who are called thither by ſpecial ſummons, tho' the reaſon of it extends to the members of the houſe of commons; the ſecond ſeems by the words of it to relate to the members of both houſes, or to all the perſons that are bound to attend the parliament. They are, both of them, of the ſame year, namely, the 8th of Edw. 2, which is about 20 years after the houſe of commons is known to have exiſted, and therefore may as well be ſuppoſed to relate to the members of that houſe as to thoſe of the houſe of lords, if the words will bear ſuch a conſtruction. As they ſeem to be well worth the reader's notice, I ſhall here inſert them at full length,

length, as I find them in Ryley's Placita Parliamentaria, in the appendix, pag. 551.

Clauſ. 8 Edw. 2, membranâ 22, dorſo.

Rex dilectis et fidelibus ſuis Henrico Spigurnel, Galfrido de Hertelpol, et Johanni de Bouſſer, juſticiariis ad aſſiſas, juratas, et certificationes, in comitatibus Kantii, Surriæ, et Suſſexiæ, ſalutem.

Cum nuper parliamentum noſtrum, ob certa et ardua negotia nos et ſtatum regni noſtri contingentia, apud Weſtmonaſterium, die lunæ in Octabis Sancti Hilarii proximè futuris, tenendum fecerimus ſummoneri, ac prælatis, comitibus, baronibus, et aliis quamplurimis fidelibus noſtris per brevia noſtra ſpecialiter mandaverimus quod, omnibus aliis prætermiſſis, dictis die et loco in parliamento prædicto perſonaliter interſint, nobiſcum et aliis de conſilio noſtro tunc ibidem exiſtentibus ſuper dictis negotiis tractaturi et ſuum conſilium impenſuri: Nos, indemnitati prælatorum, comitum, baronum, et aliorum fidelium noſtrorum, qui ad dictum parliamentum taliter ad mandatum noſtrum ſunt venturi, volentes pro-

proſpicere, ut tenemur, ne per eorum abſentiam, dum ſic in dicto parliamento ſteterint, exheredationem aliquam ſuſtineant aliqualiter vel incurrant, Vobis mandamus quod captionibus aſſiſarum, juratarum, et certificationum, aliquem prælatorum, comitum, baronum, et aliorum fidelium noſtrorum, quem vobis conſtiterit de mandato noſtro prædicto ad dictum parliamentum venire, tangentium ſuperſedeatis durante parliamento prædicto.

Teſte rege apud Langele, 15 die Jan.

Eodem modo mandatum eſt juſticiariis ad aſſiſas, juratas, et certificationes in ſingulis comitatibus Angliæ capiendas aſſignatis.

Ibidem, membranâ 33, dorſo.

Rex dilectis et fidelibus ſuis Gilberto de Ormeſby et Roberto de Madingle, juſticiariis ad aſſiſas in comitatibus Norfolciæ et Suffolciæ capiendas aſſignatis, ſalutem.

Indemnitati illorum qui ad præſens parliamentum noſtrum uſque Eborum ad ſummonitionem noſtram perſonaliter venerunt, et ſimiliter aliorum qui ibidem per præceptum noſtrum moram faciunt, proſpicere volentes, præſertim cum abſentes jura ſua defendere

defendere nequeant ut præſentes, Vobis mandamus quod ad aliquas aſſiſas illos qui ad parliamentum noſtrum prædictum ad ſummonitionem noſtram venerunt, ac alios qui ibidem per præceptum noſtrum, ut præmittitur, moram trahunt, vel eorum aliquem, tangentes capiendas, eodem parliamento durante, minimè procedatis.

Teſte rege apud Eborum, 12 die Sept.

Eodem modo mandatum eſt Lamberto de Trykyngham et Johanni Chaynel juſticiariis ad aſſiſas in comitatu Lincolniæ capiendas aſſignatis, de verbo in verbum.

Teſte ut ſuprà.

Per ipſum regem et conſilium.

From theſe two writs it ſhould ſeem that ſo early as the 8th year of king Edward 2d all members of parliament, commoners as well as lords, were privileged not only from having their perſons arreſted, but from every other kind of proceſs in civil actions of all kinds, real as well as perſonal, during the ſitting of the parliament. And by the king's anſwer to the petition of the maſter of the temple cited above, p. 35, the privilege of parliament ſeems (notwithſtanding

withſtanding Mr. Prynne's comment to the contrary, which has alſo been cited in the ſame place) to have extended ſtill further, and to have protected the members from being diſtrained upon by their landlords for arrears of rent during the ſitting of parliament. This ſeems to have occaſioned the maſter of the temple to make a ſpecial petition to the king in parliament to grant him a licence to diſtrain for his rent notwithſtanding the parliament was ſitting; for otherwiſe he might have done it without a petition. But the king thought the licence requeſted would be diſhonourable to parliament, and therefore refuſed it. Sed quære, this record being very obſcure.

Lord Coke is exceedingly ſhort upon the privilege of parliament in criminal caſes, or proſecutions at the ſuit of the king. He only ſays, that in informations for the king generally the privilege of parliament does hold, unleſs it be in three caſes, viz. treaſon, felony, and the peace.

This is all that is to be found in my lord Coke. But Mr. Prynne has given us three more records, of which the following

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ing one ſeems to be the moſt material. It is an original writ of treſpaſs in the 9th year of Edw. 2, directed to the ſheriff of Yorkſhire, to attach by gage and pledges four treſpaſſers, named in the writ, that they ſhall appear on ſuch a day in the court of King's Bench, to make anſwer concerning a treſpaſs committed againſt the prior of Malton, by arreſting him by his horſes and harneſs, and keeping him a conſiderable time under arreſt, as he was returning home from parliament, in contempt of the king, to the prior's damage of 200 l. and againſt the king's peace. It is as follows.

Edwardus, Dei gratiâ Rex Angliæ, Dominus Hiberniæ, et Dux Aquitaniæ, vicecomiti Eborum ſalutem. Pone per vadium et ſalvos plegios Walterum de Flemmyng de Eborum, Ricardum de Duffeld, Willielmum de L'abbeye, et Simonem le Clerk de Eborum, quod ſint coram nobis a die Paſchæ in tres ſeptimanas ubicunque tunc fuerimus in Angliâ, oſtenſuri quarè, cum ad parliamenta, in quibus

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tam noſtri quam regni noſtri negotia debent pertractari, Prælatos, Comites, Barones, et alios tam clericos quam laicos, per quorum induſtriam ſuper negotio hujuſmodi conſilium ſalubrius poterit adhiberi, ad mandata noſtra vocatos et comparentes, *in veniendo ad eadem parliamenta, ibidem morando, et exinde redeundo, ab omnimodis injuriis, oppreſſionibus et gravaminibus nos oportet protegere et tueri*, præfati Walterus, Ricardus, Willielmus, et Simon dilectum nobis in Chriſto Priorem de Malton nuper de parliamento noſtro, quod apud Lincolniam in quindenâ Sancti Hilarii proximè præteritâ ſummoneri fecimus, ad propria redeuntem, in civitate noſtrâ Eborum per equos et herneſia ſua, quo minus idem Prior quaſdam cartas et quædam munimenta hæreditatem Willielmi de Veſci jam defuncti contingentia et in cuſtodiâ ejuſdem Prioris apud Malton reſidentia, proüt ſibi per nos in parliamento prædicto plenius fuerat injunctum, deferre potuiſſet, arreſtarunt et ſub arreſto diu detinerunt, in noſtri contemptum et coronæ noſtræ præjudicium,

ac damnum ipſius Prioris ducentas libras, et contrà pacem noſtram.

Teſte me ipſo apud Lincolniam, 22 die Feb. anno regni noſtri nono.

Per Conſilium.

Plegii Walteri de Flemmyng de Eborum	Nic. de Dunelm. Alex. de Thorpe.
Plegii Ricardi de Duffeld	Walt. de Gedell. Ric. de Forcur.
Plegii Willielmi del'Abbeye	R. de Carpenter. Al. del'Abbeye.
Plegii Simonis le Clerk de Eborum	Wal. de Kneton. Ad. de Gedell.

This writ by the general words *et alios tam clericos quam laicos* following the words *prælatos, comites, et barones*, ſeems to comprehend all the perſons who were obliged to attend parliament, of what rank or degree ſoever, and to prove that all theſe perſons were intitled to the king's protection in going to parliament, during their attendance in parliament, and in their return home from parliament.

Of the other two records given us by Mr. Prynne in the ſame book, the firſt is a commiſſion in 20 Edw. 1. to certain juſtices to make inquiry concerning the perſons

ſons who had been guilty of murdering Roger de Dreiton, the earl of Cornwall's treaſurer, as he was going to the parliament: The other is alſo a commiſſion granted to certain juſtices, ann. 11. Ric. 2. (in Prynne's Animadverſions on the 4th Inſtitute, pag. 331.) to inquire who were the perſons concerned in a grievous riot committed upon the lands and againſt the ſervants of Sir John de Derwentwater, one of the knights of the ſhire for Cumberland, while he was attending the parliament. But as both theſe violences would have been the objects of ſevere puniſhment by the common courſe of the law, though they had not been committed againſt the ſervants of members of parliament, they do not ſeem to prove any thing concerning the privilege of parliament, and therefore are here omitted.

Mr. Prynne, in treating of this ſubject, gives us one obſervation more which ought by no means to be omitted. He ſays, that the ſerving a citation out of an eccleſiaſtical court, or any other proceſs of law that does not reſtrain the perſon, upon a member of

parliament is no breach of privilege; and that this was reſolved by the whole houſe of commons upon a ſolemn conference with the lords in the caſe of Mr. Beaumont and his wife, who ſerved the earl of Huntingdon with a Subpœna in the ſecond parliament in the 1ſt year of queen Mary, die Martis, 7mo die Aprilis, entered in the Commons Journal, fol. 107, with this ſpecial note in the margin, Serving of a Subpœnâ no breach of privilege. See Prynne's Animadverſions on the 4th Inſtitute, pag. 18, 19, 20, 21.

I find no more in this laſt-mentioned book of Mr. Prynne, nor any thing more than has been already quoted in Ryley's Placita Parliamentaria, concerning the privilege of parliament. And there is nothing ſaid of it in Plowden's Commentaries. In Dyer's Reports we have one caſe concerning it, fol. 59, b, which I have here tranſlated, and is as follows.

Trewyn-

Trewynniard's caſe. Eaſter, 36 and 37 Hen. 8, anno dom. 1544, in B. R. Vide Dyer, fol. 59, b.

In the King's Bench the caſe was this. One William Trewyniard was impriſoned upon a writ of Exigent that iſſued upon a Capias ad Satisfaciendum at the ſuit of one Skewis; and he being thereupon taken in execution, a writ of the privilege of parliament iſſued to Robert Chamond, at that time ſheriff of the county of Cornwall, reciting that Trewynniard was a burgeſs of parliament, and likewiſe reciting the cuſtom of privilege of parliament. The ſheriff in obedience to this writ, during the laſt ſeſſion of the laſt parliament held in the 35th year of the king that now is, let Trewynniard go at large. Hereupon the executors of Skewis bring an action of debt againſt the ſaid Chamond; and they demurred in law upon this matter.

In this caſe there are three things to be conſidered:

1ſt, Whether the privilege of parliament lay in this caſe for a burgeſs of the parliament arreſted upon a writ of execution.

2dly, Suppoſing the privilege lay in this

caſe, whether the party, upon his being enlarged in conſequence of it, ſhall by ſuch enlargement be abſolutely diſcharged from all execution to be had againſt him by the other party at any time hereafter, or only during the time of parliament.

3dly, Whether, if privilege ſhould be held not to lie at all in this caſe, the having acted in obedience to this writ, as the king's warrant to him proceeding from the parliament, ſhall not be a ſufficient excuſe for the ſheriff's conduct, and diſcharge him from being anſwerable to the plaintiff for the debt.

With reſpect to the firſt point, it ſeemeth that privilege is to be allowed in this caſe. For the proof of this it is neceſſary to conſider the eſtate of parliament, which conſiſts of three parts, namely, the king as the chief head, the lords as the chief and principal members of the body, and the commons, to wit, the knights, citizens, and burgeſſes, as the inferior members; and all together conſtitute the body of the parliament. It is alſo proper to conſider the elections of theſe members, with what care

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and ſolemnity they are elected, the manner of performing which elections appears in the ſtatutes made concerning them. And when they are choſen and returned to parliament, it is underſtood by all men that they are the wiſeſt and moſt diſcreet men in the kingdom, and the fitteſt to debate upon the good of the commonwealth; and accordingly the writ of ſummons to parliament directs that they be choſen *de gravioribus et diſcretioribus viris, &c.* And after they are thus returned, their perſonal attendance in the parliament is ſo neceſſary that they ought not for any buſineſs whatſoever to be abſent, and not one perſon can be well ſpared becauſe he is a neceſſary member; and for this reaſon, if any member dies during the parliament, a new one is to be choſen in his ſtead, to the end that the whole number may be kept up undiminiſhed. And from hence it follows that the perſon of every ſuch member ought to be privileged from being arreſted at the ſuit of any private perſon during the time that he is buſied about the affairs of the the king and kingdom. And this privi-

lege has always been granted by the king to his commons at the requeſt of the ſpeaker of the parliament the firſt day, &c. Therefore common reaſon directs that, inaſmuch as the king and all his kingdom have an intereſt in the perſon of each of the ſaid members, the private convenience of any particular man ought not to be regarded: for it is a maxim in the law, *Quod magis dignum trahit ad ſe minus dignum*; as in the caſe in the 6th year of Edw. 4, p. 11, that if a man is condemned in treſpaſs or rediſſeiſin, and is in execution for the fine to the king, if he is outlawed for felony, his body ſhall not be impriſoned at the ſuit of the party, becauſe the king has an intereſt in his body, upon which account, &c. It may therefore be concluded that this court of parliament is the higheſt of all courts, and has more privileges than any other court of the kingdom; for which reaſon it ſeemeth that in every caſe, without any exception, every burgeſs is intitled to privilege when the arreſt is only at the ſuit of a ſubject; and the preſent caſe is ſtronger than the common

mon ones, becauſe the execution was ſued during the time of parliament, and the plaintiff had his election whether he would ſue out execution againſt his body or againſt his lands and goods. And further, every privilege is founded on preſcription; and every preſcription that promotes the public welfare is good, although it may be a prejudice to ſome private perſon: thus, in in the time of Edw. 4, a preſcription to dig in another man's ground adjoining to the ſea, in order to erect bulwarks againſt the king's enemies, was held to be good.

With reſpect to the 2d point, it ſeemeth that the party is not diſcharged from execution for ever, but only for a certain time: for it is not abſurd or unreaſonable that a judgment ſhould be at one time executed, and at another executory; as when a fine is levied with a remainder over, and after the death of the tenant a ſtranger abates, and he in remainder recovers by ſcire facias, and afterwards the recovery is reverſed for error, he or his heir ſhall have a new ſcire facias notwithſtanding it was once executed; for the cauſe will then ceaſe: and for the like reaſon the perſon

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of a man may be privileged for a certain time, and yet he may afterwards be put in priſon; as if a villain comes and lives in antient demeſne for a year, his lord cannot afterwards lay hands upon him; the law is the ſame where the preſence of the king is a ſanctuary to him; and yet formerly the lord might have ſeized upon him afterwards: by the ſame reaſon &c. And there is a difference to be made where the body of a man that is in execution is ſet at large by the authority of the law, and where it is done without authority by the ſheriff's own will and boldneſs: for the law will ſave all rights; as in the caſes of villains above-mentioned, they are by the law privileged pro tempore; but if the lord himſelf infranchiſes them by manumiſſion in deed or in law for an hour, this infranchiſement is good for ever, in favorem libertatis. Alſo the law by a particular ſtatute directs that ceſtuy a que uſe may enter and make a feoffment, and this ſhall bind his feoffees; yet if a ceſtuy a que uſe in tail makes a feoffment, this is no diſcontinuance. Alſo the law directs that, if a

biſhop preſents to a benefice by lapſe upon default of the right patron, yet his preſentation, which is made by authority of the law, ſhall not prejudice the right patrons. For theſe reaſons in the preſent caſe this enlargement by writ is only a privilege of the burgeſs pro tempore, and not a diſcharge in perpetuum; as in the caſe mentioned above that happened in 6 Edw. 4. the execution of the party to have the body in priſon was ſuſpended pro tempore until the king had pardoned him the felony, but afterwards is revived, proüt adjudicatur ibidem, by which it ſeemeth &c. It therefore follows that no action is given againſt the ſheriff for the eſcape, unleſs in reſpect that the principal debtor is diſcharged, there being no reaſon that the plaintiff ſhould be twice ſatisfied for the ſame debt, for which &c.

And as to the 3d point, it ſeemeth that the ſheriff is not anſwerable: for if no default, or laches, can be aſcribed to the ſheriff, there can be no reaſon to charge him with the debt; and there ſeems to have been no default in him. For the office of

ſheriff

ſheriff conſiſts chiefly in the execution and ſerving of writs and proceſſes of the law: and to perform theſe he is the immediate officer, and he is ſworn that he will perform them. And for this reaſon he is bound by his office and oath to make a juſt return. And the law ſuppoſes him to be a lay perſon, and not to have knowledge of the ſcience of the law; and he is therefore unable to argue or diſpute whether any writ that he receives comes to him with or without ſufficient authority: and upon this ground, if a Capias comes to him without an original writ, and he ſerves it, he will be excuſed for ſo doing in an action of falſe impriſonment, The law is the ſame if a Capias or an Exigent comes to the ſheriff againſt a duke or an earl, againſt whom it does not lie. And, to prove that the ſheriff is not bound to take notice of the law, the writ de homine replegiando directs that the ſheriff ſhall make deliverance of the body, unleſs the man was taken into cuſtody by the ſpecial commandment of the king, vel capitalis juſticiarii, vel pro morte hominis, vel pro foreſtâ,

reſtâ, vel pro aliquo alio recto quare ſecundùm conſuetudinem Angliæ non eſt replegiabilis. And further by the ſtatute of Marlbridge, cap. 8, the ſheriff ſhall be amerced if he delivers a priſoner for rediſſeiſin without ſpecial precept. And alſo the ſtatute of Weſtm. 2. c, 11, de ſervientibus et ballivis, ordains that, if any man is condemned in arrearages before auditors, and committed to the next gaol, the ſheriff or gaoler ſhall not deliver him by a writ de homine replegiando, nec aliter, without the conſent of his maſter. And yet if the party ſues by his friends and obtains a writ of Ex parte talis returnable in the Exchequer, he may let him go at large: and, notwithſtanding that he is once diſcharged, if it appears upon the examination of his accounts that he was in arrears and duly committed to priſon, he ſhall be remanded to priſon quouſque &c, And let us ſuppoſe that the ſheriff in the preſent caſe had diſobeyed this writ; what damage muſt he not have ſuffered? He would have been in danger of perjury, and alſo of impriſonment of his body, and ranſom at

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the king's will: and this was done in this ſame parliament againſt Rowland Hill and Suckley the ſheriffs of London, who were committed to the Tower for their contempt becauſe they would not let George Ferris, who was arreſted upon an execution, go at large when the ſerjeant at arms came to demand him, though without a writ. And it is probable this precedent was a terror to Chamond, and made him fearful of diſobeying the writ of parliament which is the higheſt court of the kingdom. And it appears plainly by the writ that they were clearly of opinion in the parliament that the party ought to have his privilege in this caſe; for otherwiſe the writ would only have been an Habeas Corpus cum cauſâ, which writ is oftentimes granted before the juſtices are agreed whether privilege lies in the caſe or no; and if they find that privilege does not lie in the caſe before them, they remand the matter with a procedendo &c. And therefore, although the parliament ſhould have acted erroneouſly in granting the writ, yet their act

cannot

cannot be reviſed by any other court: and therefore there is no default in the ſheriff.

This report acknowledges and eſtabliſhes the privilege of members of the houſe of commons to be protected from arreſts during the ſitting of parliament in all civil caſes, but determines nothing concerning it in any criminal proſecution. However the principal reaſon given in this caſe for the allowance of this privilege in civil caſes, namely, that the attention of the members may not, without great cauſe, be diverted from the important affairs they are called together to deliberate upon, will perhaps hold alſo in the caſe of criminal proſecutions for the inferior kind of offences; ſince their being protected from proſecutions of this ſort for the ſhort ſpace of three weeks or a month in the year, which (as Mr. Prynne informs us in the paſſage quoted above, pag. 36.) was the uſual length of a ſeſſion of parliament in antient times when theſe privileges were firſt claimed and eſtabliſhed, would be attended with little more inconvenience than their being protected during the ſame time from proceſſes

proceſſes in civil actions. And that the privilege of parliament did extend to this kind of criminal caſes has certainly been a general opinion amongſt lawyers. But we proceed to mention ſome other authorities.

In Crompton's Juriſdiction of Courts, in the chapter on the high court of parliament, fol. 8, b, we have the following paſſage concerning the ſubject of privilege, including in it an account of the caſe of George Ferrers mentioned by Dyer in the foregoing report recited at large from Holingſhed's Chronicle.

Every knight, burgeſs, baron of the Cinque-ports, or other perſon called to the king's parliament, ſhall have privilege of parliament during the parliament or ſeſſion of parliament; ſo that any man who ſhall arreſt one of them during this time ſhall be impriſoned in the Tower by the nether houſe to which he belongs, and ſhall be put to a fine; as ſhall likewiſe he who keeps him in cuſtody, if he will not releaſe him when the ſerjeant at arms comes for him

him by the command of the houſe to which he belongs. Dyer, 60.

Vide Dyer, fol. 275. One that was a burgeſs of parliament was in execution; and he was let go at large by a writ of privilege of parliament. P. 34 & 35 Hen. 8. Ro. 23. And an action of debt was brought againſt the jailer for an eſcape: ſed non dicit quid evenit inde.

Vide Holingſhed in his Chronicle, fol. 1584, the caſe of one Ferrers ſet down at length, who was a burgeſs of parliament, and was arreſted and taken in execution in London while the parliament was ſitting, how he was thereupon delivered, I have here tranſcribed it from the hiſtorian. It happened in the 34th year of Hen. 8, and was the caſe of that Ferrers, as I believe, of whom Dyer ſpeaks fol. 275.

George Ferrers's caſe.

In the Lent ſeaſon whilſt the parliament yet continued, one George Ferrers, gentleman, ſervant to the king, being elected a burgeſs for the town of Plymouth in the county of Devon, in going to the parlia-

ment houſe was arreſted in London by a proceſs out of the King's-bench, at the ſuit of one White, for the ſum of two hundred marks or thereabouts, wherein he was late afore condemned as a ſurety for the debt of one Welden of Saliſbury, which arreſt being ſignified to Sir Thomas Moile, knight, then ſpeaker of the parliament, and to the knights and burgeſſes there, order was taken, that the ſerjeant of the parliament called S. J. ſhould forthwith repair to the Counter in Breadſtreet, whither the ſaid Ferrers was carried, and there to demand delivery of the priſoner. The ſerjeant as he had in charge went to the counter and declared to the clerks there what he had in commandment; but they and other officers of the city were ſo far from obeying the ſaid commandment, as after many ſtout words they forcibly reſiſted the ſaid ſerjeant, whereof enſued a fray within the Counter-gates, between the ſaid Ferrers and the ſaid officers, not without hurt of either part, ſo that the ſaid ſerjeant was driven to defend himſelf with his mace of arms, and the crown thereof broken

broken by bearing off a ſtroke, and his man ſtrucken down: during this brawle the ſheriffs of London, called Rowland Hill, and H. Suckley came thither; to whom the ſerjeant complained of this injury, and required of them the delivery of the ſaid burgeſs, as afore; but they bearing with their officers made little account either of his complaint, or of his meſſage, rejecting the ſame contemptuouſly, with much proud language, ſo as the ſerjeant was forced to return without the priſoner, and finding the ſpeaker, and all the knights and burgeſſes ſet in their places, declared unto them the whole cauſe as it fell out, who took the ſame in ſo ill part, that they all together (of whom there were not a few as well of the king's privy council as alſo of his privy chamber) would ſit no longer without their burgeſs, but roſe up wholly and repaired to the upper houſe, where the whole caſe was declared by the mouth of the ſpeaker before Sir T. Audeley, knight, then lord chancellor of England, and all the lords and judges there aſſembled, who

judging the contempt to be very great, referred the puniſhment thereof to the order of the commons houſe. They returning to their places again, upon new debate of the caſe, took order that their ſerjeant ſhould eftſoone repair to the ſheriffs of London, and require delivery of the ſaid burgeſs, without any writ or warrant had for the ſame, but only as afore. Albeit the lord chancellor offered there to grant a writ, which they of the commons houſe refuſed, being in a clear opinion, that all commandments, and other acts proceeding from the nether houſe, were to be done and executed by their ſerjeant without writ, only by ſhew of his mace which was his warrant. But before the ſerjeant returned into London, the ſheriffs having intelligence how heinouſly the matter was taken, became ſomewhat more mild, ſo as upon the ſaid ſecond demand, they delivered the priſoner without any denial, But the ſerjeant then having further in commandment from thoſe of the nether houſe, charged the ſaid ſheriffs to appear perſonally on the morrow by eight of the clock

clock before the ſpeaker in the nether houſe, and to bring thither the clerks of the Counter, and ſuch other of their officers as were parties to the ſaid affray, and in like manner to take into his cuſtody the ſaid White, which wittingly procured the ſaid arreſt, in contempt of the privilege of the parliament, which commandment being done by the ſaid ſerjeant accordingly, on the morrow, the two ſheriffs with one of the clerks of the Counter (which was the chief occaſion of the ſaid affray) together with the ſaid White appeared in the commons houſe, where the ſpeaker charging them with their contempt and miſdemeanor aforeſaid, they were compelled to make immediate anſwer, without being admitted to any counſel. Albeit Sir Ro. Cholmley, then recorder of London, and other the counſel of the city there preſent offered to ſpeak in the cauſe, which were all put to ſilence, and none ſuffered to ſpeak but the parties themſelves; whereupon in concluſion the ſaid ſheriffs and the ſaid White were committed to the Tower of London, and the ſaid White (which was

the occaſion of the fray) to a place there called Little Eaſe, and the officer of London which did the arreſt, called Tailer, with four officers to Newgate, where they remained from the 28th until the 30th of March, and then they were diſcharged, not without humble ſuit made by the mayor of London and others their friends. And foraſmuch as the ſaid Ferrers being in execution upon a condemnation of debt, and ſet at large by privilege of parliament, was not by law to be brought again into execution, and ſo the party without remedy for his debt, as well againſt him as his principal debtor, after long debate of the ſame, by the ſpace of nine or ten days together, at laſt they reſolved upon an act of parliament to be made, and to revive the execution of the ſaid debt againſt the ſaid Welden, which was principal debtor, and to diſcharge the ſaid Ferrers, But before this came to paſs the commons houſe was divided upon the queſtion: but in concluſion, the act paſſed for the ſaid Ferrers, who won by fourteen voices. The king being then adverti ſed of this proceeding,

ceeding, called immediately before him the lord chancellor of England and his judges, with the ſpeaker of the parliament, and other the graveſt perſons of the nether houſe, to whom he declared his opinion to this effect. Firſt commending their wiſdom in maintaining the privileges of their houſe (which he would not have to be infringed in any point) alledged that he being head of the parliament, and attending in his own perſon upon the buſineſs thereof, ought in reaſon to have privilege for him and all his ſervants attending there upon him. So that if the ſaid Ferrers had been no burgeſs, but only his ſervant, that in reſpect thereof, he was to have the privilege as well as any other. For I underſtand (quoth he) that you not only for your own perſons, but alſo for your neceſſary ſervants, even to your cooks and horſekeepers, enjoy the ſaid privilege, inſomuch as my lord chancellor here preſent, hath informed us, that he being ſpeaker of the parliament, the cook of the Temple was arreſted in London, and in execution upon a ſtatute of the Staple: and foraſmuch as

the ſaid cook, during the parliament, ſerved the ſpeaker in that office, he was taken out of execution by the privilege of the parliament: and further we be informed by our judges, that we at no time ſtand ſo highly in our eſtate royal as in the time of parliament, wherein we as head, and you as members, are conjoined and knit together into one body politick, ſo as whatſoever offence or injury during that time is offered to the meaneſt member of the houſe, is to be judged, as done againſt our perſon, and the whole court of parliament, which prerogative of the court is ſo great (as our learned counſel informeth us) as all acts and proceſſes coming out of any other inferior courts, muſt for the time ceaſe and give place to the higheſt. And touching the party, it was a great preſumption in him, knowing our ſervant to be one of this houſe, and being warned thereof before, that he would nevertheleſs proſecute this matter out of time, and therefore he was well worthy to have loſt his debt, which I would not wiſh, and therefore do commend your equity, that having loſt the

ſame by law, have reſtored him to the ſame againſt him who was his debtor: and this may be a good example to other not to attempt any thing againſt the privilege of this court, but to take the time better. Whereupon Sir Edward Montague, then lord chief juſtice, very gravely declared his opinion, confirming by divers reaſons all that the king had ſaid, which was aſſented unto by all the reſidue, none ſpeaking to the contrary. The act indeed paſſed not the higher houſe; for the lords had not time to conſider of it, by reaſon of the diſſolution of the parliament. Becauſe this caſe has been diverſly reported, and is commonly alledged as a precedent for the privilege of the parliament, I have endeavoured myſelf to learn the truth thereof, and to ſet it forth with the whole circumſtances at large, according to their inſtructions who ought beſt both to know and remember it.

Note, that Danby ſaid that he knew an inſtance of a Man who came to Weſtminſter, being one of the parliament, and was arreſted and taken in execution upon

a condemnation a long time before the parliament; and he demanded to be diſmiſſed out of execution; aad the matter was made known to the king's counſel and the juſtices of the Common-pleas, and it was determined that he could not be diſmiſſed: and Coke ſaid that there was truth in what was ſaid in 2 Edw. 4. fol. 8. (vide Dyer 162) that a man in execution for debt, although he was neceſſary for the war, which was for the public good, yet could not be releaſed out of execution, per omnes juſticiarios.

The parliament will not give any privilege tempore vacationis, ſed ſedente curiâ. Privilege, Br. 56.

The ſervants that attend upon their maſters during the parliament, and are neceſſary to them, ſhall have privilege of parliament, ſo that they ſhall not be arreſted for debt or any ſuch cauſe: and the like privilege ſhall be enjoyed by the neceſſary officers that attend upon the parliament, as the ſerjeant at arms, the mace-bearer, the clerks, and other the like perſons: and this privilege ſhall protect alſo their chattels

tels and neceſſary goods. None of theſe ſeveral perſons ſhall be arreſted or taken by any other officer, unleſs it be in the caſe of treaſon or felony: but they ſhall have their privilege allowed them in the ſame manner as the judges and the officers of the other courts have a privilege for their ſervants, their goods, and neceſſary chattels. Privilege, Br. 6, 29. 24. for the laſt matter.

In Crompton's Juriſdiction of Courts, fol. 3, b, we alſo find the following paſſage concerning the proceſs uſed in the ſtar-chamber (which was a court of very high criminal juriſdiction, and in which for the moſt part the ſame ſort of crimes were puniſhed as are now puniſhed by information in the court of King's Bench) againſt a lord of parliament. "Where a lord of parliament is proſecuted in this court, the chancellor ſhall write to him, giving him notice of the ſaid ſuit againſt him, and requiring him to appear on a certain day to anſwer to the ſaid bill; *at which day if he does not appear, yet no attachment ſhall iſſue againſt him, as there ſhall againſt other ſubjects of an inferior rank.*"

This is a very clear acknowledgment of the

the privilege of peers in the court of ſtar-chamber, and affords a reaſonable preſumption that they ought to have the like privilege in the King's Bench and all other courts of criminal juriſdiction; and accordingly Sir Robert Sawyer, who had been many years attorney-general, and well underſtood the doctrine of criminal proſecutions, in which he had been but too buſy, affirms poſitively in the trial of the ſeven biſhops for a libel in the 4 Jac. 2. that this privilege had always been allowed to peers in proſecutions in the King's Bench for miſdemeanours, and that another proceſs had been uſed againſt them inſtead of the Capias, namely, after a Summons a Diſtringas, and ſo on ad infinitum. This caſe of the ſeven biſhops, ſo far as it relates to the preſent queſtion of privilege, may be ſtated as follows.

The caſe of the Seven Biſhops.

King James the 2d, intending to allow the public exerciſe of the popiſh religion in England, publiſhed a declaration of a general liberty of conſcience, containing a ſuſpenſion of all the penal laws that were in force concerning religion, and made an

order of council that this declaration ſhould be publickly read on certain days in all churches and chapels throughout the kingdom, and that the biſhops ſhould cauſe it to be ſent and diſtributed through their ſeveral dioceſes in order to be read accordingly. This being contrary to the plaineſt principles of law, and to no leſs than three parliamentary declarations during that and the foregoing reign, that the king ſhould by his ſole authority inſtantly ſuſpend and, in effect, repeal ſo many laws that were ſtill in force and that had been made for the protection of the eſtabliſhed religion, ſeveral of the biſhops refuſed to diſtribute the declaration, and ſeven of them meeting together in private drew up a petition to the king, conceived in the moſt reſpectful and ſubmiſſive terms, ſetting forth the reaſons why they thought the king's declaration illegal, and therefore could not conſent to be inſtrumental in publiſhing it; and this petition they humbly preſented to the king in the preſence of no other perſon whatſoever. For preſenting this petition, which the king thought proper to call a ſeditious libel, they were ſummoned to appear before

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the privy council, and by an order of that board were committed to the Tower; and ſoon after they were brought up, by a writ of Habeas Corpus moved for on the behalf of the crown, to the bar of the King's Bench, in order to be charged with an information in the name of the attorney-general for publiſhing a ſeditious libel. They were aſſiſted on this occaſion by four very able counſel; Sir Robert Sawyer, who had been attorney-general, Mr. Finch, who had been ſollicitor-general, Serjeant Pemberton, and Mr. Pollexfen. Theſe gentlemen made two objections to the return of the Habeas Corpus, upon which they inſiſted the biſhops ought to be diſcharged.

The firſt objection to the return was that it did not aver that the warrant of commitment was made by the privy-council, but only that it was made by ſuch and ſuch perſons lords of the privy-council, without ſpecifying that at the time of making it they were duely aſſembled in council. They inſiſted that neither a ſingle lord of the privy-council, nor any number of them aſſembled together otherwiſe than

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in the privy-council, had any legal power to commit; and this after ſome ſome conteſt was agreed to by the king's counſel and the court; *quod nota.* And they inſiſted that the authority under which the commitment was made ought to be ſet forth preciſely in the return, and that the court were not at liberty to preſume any thing in ſupport of it: that therefore it did not appear to the court that the biſhops had been legally committed. Conſequently not being legally committed, they were not to be conſidered as legally preſent in court, and therefore could not be charged with an information: but on the contrary, that they ought to be ſet at liberty; and then that the court might proceed *de novo* againſt them by the proper proceſs, till they were legally brought into court; and then, and not before, they might be charged with the information.

In anſwer to this objection the court obſerved that the warrant of commitment, which was annexed to the return of the writ of Habeas Corpus, appeared upon the face of it to have been made in the privy-council;

council; and therefore that they ſhould take it to be ſo notwithſtanding this circumſtance was not expreſsly mentioned in the return itſelf. And upon this ground this firſt objection to the return was over-ruled.

The ſecond objection to the return was that the biſhops, being lords of parliament, ought not to have been committed at all for the crime mentioned in the return, which was publiſhing a ſeditious libel, which is only a miſdemeanour, their privilege as lords of parliament protecting them from all arreſts excepting for treaſon, felony, and ſuch breaches of the peace for which ſureties of the peace might be required: that therefore they were not legally preſent in court, and ought not be charged with an information, but ſhould be ſet at liberty, and then proceeded againſt *de novo* by the proper proceſs till they were legally brought into court. In ſupport of this objection, grounded on the biſhops privilege as lords of parliament, Sir Robert Sawyer ſpoke as follows.

It muſt be agreed to me that if a peer be brought into court as taken by a Capias, he

he cannot be charged with a declaration; and the reaſon is becauſe the proceſs is illegal. Then, my lord, with ſubmiſſion, when a peer comes upon a foreign commitment, and is brought in cuſtody upon a Habeas Corpus, this is either in the nature of a proceſs, or a final commitment as a judgment. They will not ſay that this is a good commitment, ſo as to amount to a judgment: for the council-board could not give a judgment in the caſe. Beſides, the commitment is illegal, becauſe it is not a commitment till they find ſecurity to anſwer an information here, but it is a warrant to keep them for a miſdemeanour. Beſides there is another thing we have to ſay to this warrant (for I am making objections againſt the validity of this commitment); it does not appear that there was any oath made, and therefore the court muſt adjudge that there was no oath made, and then no man ought without oath to be committed, much leſs a peer. But that which we chiefly rely upon is, that my lords ought not to have been committed for this, which is but a miſdemeanour at moſt:

and if they uſe it as proceſs to bring my lords the biſhops to anſwer an information, we ſay, by law no ſuch proceſs can be taken out againſt the perſons of peers for bare miſdemeanours. I do agree that for felony, treaſon, or ſurety of the peace, the perſons of peers may be committed; and that which is called ſurety of the peace in our books, Mr. Solicitor knows very well, in ſome of the rolls of parliament is called breach of the peace: but it is all one; and the meaning in ſhort is, that it is ſuch a breach of the peace as for which a man by law may be obliged to find ſureties of the peace. If it ſhould mean a breach of the peace by implication, as all treſpaſſes and miſdemeanours are ſaid to be *contra pacem* in the indictment or information, then it were a ſimple thing to enumerate the caſes wherein privilege did not lie; for there could be no information whatſoever but muſt be *contra pacem*, and ſo there would be no ſuch thing as privilege at all. And beſides we ſay, the very courſe of this court is contrary to what they would have: for in the caſe of a peer, for a miſdemean-

our, you go firſt by ſummons, and then you do not take out a Capias, as againſt a common perſon; but the next proceſs is a Diſtringas, and ſo ad infinitum. And I do appeal to them on the other ſide, and challenge them to ſhew any one precedent, when a peer was brought thus into court to be charged with an information, without it were in the caſe of an apparent breach of the peace: for he muſt be charged in cuſtody, and there muſt be a Committitur to the marſhal to intitle the court to proceed. Your lordſhip will find but very few precedents of caſes of this nature about common perſons: for till within theſe fourteen or fifteen years there was no ſuch thing ever done againſt a common perſon; but this was the rule. Firſt there went out a Subpœnâ, and then an attachment; and when the party was taken upon the attachment, he was taken to come in upon proceſs, and then the court would charge him preſently; but if he did appear upon the ſummons, they would not charge him; but he had time to take a copy of the information, and an imparlance of courſe

till the next term, before he could be compelled to plead. But in the caſe of a peer, there never was any ſuch precedent as the attaching of his perſon, but only a ſummons and diſtreſs: and I would be glad the king's council would ſhew that ever there was any ſuch proceſs taken out againſt the perſon of a peer for a meer miſdemeanour. My lord, 'tis plain what breach of the peace means in every information; and I only ſpeak this to acquaint the court how the conſtant proceedings in all theſe caſes have been. Theſe informations were antiently more frequent in the ſtar-chamber: and what was the proceſs there? Not the common proceſs of a Subpœnâ; that was not the courſe there; but the proceſs was a letter from the chancellor; that if the party upon that letter did not appear, in a common caſe there went out an attachment, but in a peer's caſe never: and ſo it appears by Crompton's Juriſdiction of Courts, title ſtar-chamber 33.

And a little lower Sir Robert Sawyer ſays; In my experience of theſe matters I don't

don't know any ſuch proceedings againſt a peer; nay, I know it always to be the caſe, that in informations for miſdemeanours there did never iſſue out a Capias againſt a peer: and Mr. Attorney knows very well it was ſo in the late caſe of my lord Lovelace; for that caſe of my lord Devonſhire, that it was an expreſs breach of the peace, though it was debated and diſputed then. So that I take it thoſe noble lords cannot be charged with this information, becauſe they do not come in by legal proceſs; and unleſs they can ſhew me any caſes wherein a peer did ever come in upon ſuch a commitment, and anſwered to an information upon that commitment, it muſt certainly be allowed not to be the legal courſe; though if ſuch a precedent could be ſhewn that paſſed *ſub ſilentio*, without debate or ſolemn determination, that would not do, not could bind the reſt of the peers. If any man would loſe a particular benefit he has, all the whole body muſt not loſe it: and the benefit is not ſmall, of time to make his defence, of imparling, of taking a copy of the indictment, and preparing himſelf

to plead as the caſe will bear: and indeed a common perſon has uſed to have theſe privileges, though in ſome caſes of late they have taken the other courſe; and if a Capias went out (which we ſay cannot go againſt a lord) and the party were brought in, he was to anſwer immediately. Now, my lord, I take it that the privllege of peers is in all times the ſame with the parliamentary privilege in parliament-time, which reacheth to informations as well as other actions. My lord Coke is expreſs in this point in the 4 Inſtit. 25. If that objection ſhould hold good, that every information being *contra pacem*, that ſhould be a breach of the peace, then, as I ſaid before, privilege will hold in no information, which is contrary to that and all our other books: 'tis only ſuch a breach of the peace as for which ſecurity of the peace may be required.——Where it does not appear upon record that the perſons committed are lords of parliament, there the court have put them to bring their writs of privilege; but were it does appear upon record that they are peers, the court is to allow

allow and take notice of their privilege, and there needs no ſuch writ.——I know no difference between the parliament-priviledge and the privilege of peers out of parliament; and it cannot be denied that all informations whatſoever, unleſs ſuch as are for breaches of the peace, for which ſurety of the peace may be required, are under the controul of the parliament-priviledge. So that upon theſe grounds I do preſs that my lords the biſhops may be diſcharged. If there be any information againſt us, we are ready to enter our appearance to anſwer it according to the courſe of the court: but if the information be for no other thing than what is contained in the warrant of commitment, then their perſons ought to be privileged from commitment.

Mr. Finch and Serjeant Pemberton made ſhort ſpeeches to the ſame effect, but left the weight of the argument to Sir Robert Sawyer; ſo that the whole of what the biſhops counſel ſaid on this point of privilege is contained in the foregoing ſpeech, to which the king's counſel made no other

poſitive and clear anſwer but this, that publiſhing a ſeditious libel was ſuch a crime for which ſureties of the peace might be required, and therefore came not within the benefit of privilege according to the rule laid down by the biſhops counſel. The court adopted this anſwer, and upon this ſingle ground over-ruled the objection made by the biſhops counſel, and ordered the information to be read and the biſhops to plead to it. See the trial of the ſeven biſhops in the State Tryals, vol. iv. p. 312.

From this report it appears that it was at this time generally underſtood amongſt lawyers, that the perſons of peers were privileged from arreſts for all miſdemeanours for which ſureties of the peace could not be demanded as well as in civil actions: for this is poſitively aſſerted and enlarged upon by the biſhops counſel, and the courſe of the court is affirmed to have been accordingly; and theſe aſſertions and arguments are not encountred by any reaſons or precedents produced on the other ſide by the king's counſel, though ſo much concerned to produce ſuch, if there were any;

any; nor were they denied by the court: but they all impliedly (though not expreſsly) admit the privilege to lie by reſorting to an obſervation on the nature of the offence in queſtion, which takes it out of the benefit of privilege, namely, that publiſhing a ſeditious libel is an offence for which ſureties of the peace may be required. And this general opinion of the great lawyers at that time, to whom we may add alſo lord chief juſtice Holt (as appears from the caſe of the king and Culpepper which is ſubjoined here below); together with the teſtimony of the experienced Sir Robert Sawyer concerning the peculiar proceſs of ſummons and Diſtringas uſed in the King's Bench againſt peers for miſdemeanours; the paſſage from Crompton proving that no Capias lay againſt them in the ſtar-chamber; the undoubted exiſtence of their privilege in treſpaſs as well as debt, though treſpaſs partakes in ſome degree (and antiently did ſo much more) of the nature of a criminal proſecution; the general dictum at the end of the caſe of the prior in 21 Edw. 3; and the ſaving of the liberties of

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the bodies of lords of parliament in the ſtat. 38 Edw. 3, which is a penal ſtatute; all theſe circumſtances taken together ſeem to afford a tolerable proof that the lords of parliament are intitled to ſuch a privilege of their perſons in miſdemeanours as well as in civil caſes.

It appears further from the foregoing ſpeech of Sir Robert Sawyer that the privilege of peers out of parliament-time was generally underſtood and allowed to be of the ſame extent with the privilege of the members of either houſe of parliament during the ſitting of parliament. And upon this analogy between the two privileges Sir Robert endeavours to prove the privilege of peerage from that of parliament, which latter he ſeems to think the more evident of the two.

This ſhews that the privilege of parliament was at that time very confidently and generally allowed to extend to miſdemeanors as well as to civil actions: and this general opinion ſeems to be a conſiderable proof of the law in this caſe, if not itſelf to conſtitute the law. But if this be not thought

a ſufficient ground for ſuch a concluſion, we may yet make uſe of the other opinion of the analogy between the two privileges of peerage and parliament, and ſuppoſing it to be as well grounded as it it ſeems to have been generally received, we may reaſon upon it in a contrary order to Sir Robert Sawyer, and derive by means of it the latter privilege from the former: for having collected a variety of circumſtances (which have been juſt now recapitulated) that tend to prove that the peers were intitled to ſuch a privilege, we may conclude, if this analogy be allowed to ſubſiſt between the two privileges, that the members of the houſe of commons are likewiſe intitled to the ſame privilege in the ſame caſes during the ſitting of parliament.

The caſe of the king and Culpepper is as follows.

At a trial at bar, wherein mention is made of privilege of parliament, Holt ſaid that whereas it is ſaid in our books that privilege of Parliament was not allowable in treaſon, felony, or breach of the peace, that

that it muſt be intended, where ſecurity of the peace is deſired, that it ſhall not protect a man againſt a ſupplicavit: but it holds as well in caſes of indictments or informations for breach of the peace as in caſe of actions. 12 Mod. 108. Mich. 8 W. 3, the king verſus Culpepper. Vide Viner's Abridgment, title Parliament, pag. 189.

FINIS.
